is free to add channels to its basic tier, it is also permitted to remove all but the statutorily delineated signals to other tiers.

### 2. The Commission Should Permit Complete A La Carte Offering of Video Services

Several commenters argue that the Commission must interpret the Act as requiring a basic tier "buy-through."[55] NYS Cable Commission posits that a conclusion that a service sold on a per-channel basis constitutes a "single tier" would not be inconsistent with the Act. NYS Cable Commission at 13-14. NYS Cable Commission, however, fails to note that a basic buy-through requirement is wholly inconsistent with the overall unbundling policy of the Act. As TCI noted in its comments, the Senate Report evinces an intent to avoid forcing unwilling customers to purchase services that they do not desire: "[t]hrough unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not paying for programs they do not desire." See S. Rep. No. 92, 102d Cong., 2d Sess., at 77 (1992) ("Senate Report"). A basic buy-through also contravenes Congress' intention to leave per-channel and per-program offerings wholly free of regulation. See Act, § 623(1)(2).

---

55 See e.g., NAB at 8-9, Comments of the New York State Commission on Cable Television at 13-14 ("NYS Cable Commission").

NAB asserts that Section 614(b)(7), which states "[all must-carry stations] shall be provided to every subscriber of a cable system," read together with Section 623(b)(7)(A)'s requirement that must-carry stations be carried on the basic tier, sets out a mandate that "anyone who subscribes to the cable system for any cable service must subscribe to the basic tier." NAB at 8-9; Act § 614(b)(7); § 623(b)(7)(A). NAB's reading misinterprets the plain meaning of the Act. Section 614(b)(7) does not require that all subscribers actually subscribe to the must-carry stations. Rather, that section simply mandates that the cable system provide must-carry stations, i.e., make such stations available by offering them to all subscribers. To interpret this provision in any other manner would elevate the must-carry stations to a status of "must buy." Furthermore, an interpretation of this provision that precluded cable operators from offering a la carte services without basic would place cable operators at a competitive disadvantage in relation to their competitors, e.g., DBS, video dialtone and wireless service providers.[56]

---

56 Cablevision and Continental agree that a prohibition of a la carte offerings will place cable operators at a significant competitive disadvantage. See Cablevision at 94; Continental at 9.

### 3. A La Carte Programming Should Not Be Considered Tiers

Some commenters assert that a la carte, pay channel services, and pay-per-view programs ("premium programming") that are sold in a package of more than one channel constitute a "tier" within the meaning of the Act.[57] As TCI set forth in its comments, the Act must be read to permit the sale of two or more pay programming channels as a package, or through other forms of discount marketing, without constituting a "tier", so long as the programming channels are also offered for sale on an individual basis. TCI at 24-27. In this regard, the Notice correctly sets forth that premium programming was meant to be wholly unregulated. Notice at ¶ 95. Furthermore, Sections 623(b)(7) and 623(l)(c) evince an intent to leave premium programming unregulated, since premium programming does not fall within the definition of the basic service tier, and is excluded from the definition of cable programming services. Act, § 623(b)(7); 623 (l)(c). Indeed, it is sound policy to permit, on an unregulated basis, the sale of two or more programs together in a discounted package so long as the consumer may also purchase each of the channels separately. Consumers benefit from such marketing approaches by sharing in the reduced transaction costs. The House Report addresses one such marketing concept -- multiplexing. House Report at 80.

---

57 See CFA at 136-137; NATOA at 78; NYS Cable Commission at 13.

That Report evinces an intent that multiplexed premium channels be exempt from rate regulation "when they are offered as a separate rate tier or as a stand-alone purchase option." Id. Whether the package contains multiple channels of the same programming or a variety of programming is irrelevant to the calculus. These various marketing practices should all leave the program channels free of regulation, as long as the customer has an opportunity to purchase each of the channels separately.

C. Rate Regulation of Cable Programming Services

As we addressed in detail in our initial comments, the Act sets out a statutory framework for proactive regulation of the basic cable tier and reactive regulation of the cable programming services of cable systems not subject to effective competition. While basic tier rates are directly regulable to ensure their reasonableness, cable programming services are subject to regulation in individual cases if they are found, upon complaint, to be unreasonable. See Act, § 623(b); 623(c). As we set out in our comments, the legislative history of the Act strongly supports this reading, as do numerous commenters.[58] Indeed, the Act contemplates that only the rates for cable programming services of "bad actors" will be subject

---

58 See e.g., TCI at 6-7; Continental at 49-50; NCTA at 54-63; Arts and Entertainment at 14-17.

to regulation, not the cable programming services of all cable systems. Accordingly, the Commission must set out a mechanism through which it may readily identify the industry's "bad actors", and leave the remainder of the industry in a safe harbor. As TCI strongly urged in its comments, the Commission must establish a threshold to identify only those systems in different categories of systems with unusually high prices, i.e., the top 5 percent within any given cable system category would be subject to "bad actor" complaints. TCI at 27-30. The threshold would then be adjusted over time. Id. at 29-30. The threshold could then be raised over time by the average annual percentage increases in the "good actor" systems. Besen et al. at 49; TCI at 28-30. NCTA estimates that a measure of the top 5 percent could permit approximately 2.76 million subscribers served by approximately 550 systems to file complaints with the FCC.[59] Again, access to the Commission's database will permit more informed judgments to be made.

### D. Scheme for Regulation of Equipment Rates Should Focus on Service Subscriber Receives

A few commenters, notably CFA and NATOA, assert that all equipment that is used to receive basic cable service, regardless of whether it is also used to receive other

---

59 See Owen, Baumann and Furchtgott-Roth, "Cable Rate Regulation - A Multi-Stage Benchmark Approach," at 23 (Jan. 27, 1993), submitted in instant proceeding as part of comments of NCTA.

services, is subject to regulation based on its actual cost. See CFA at 131-32; NATOA at 48-49. NATOA also claims that the only equipment subject to reactive regulation if unreasonable would be equipment used solely to receive cable programming services. NATOA at 49. This proposition must be rejected. Such a statutory construction, especially if coupled with a basic buy-through requirement would subject practically all equipment to actual cost regulation. There is little, if any, equipment on the market that is used by a subscriber solely to receive basic tier programming if that subscriber also subscribers to other programming services. Alternatively, the proposed regulatory scheme would induce cable operators to inefficiently supply two pieces of equipment in order to avoid the negative effects of overreaching regulation.

Furthermore, as TCI noted in its comments, Congress clearly did not provide for such a broad category of regulable equipment. See TCI at 31-34. Thus, rather than focus on the capacity of the equipment to receive basic tier, cable programming or premium channels, the analysis should be tied to the programming service level that the subscriber receives. For example, the equipment provided to consumers who subscribe to both the basic tier and cable programming service would be subject to the complaint process established for bad actor rates, while the equipment provided to subscribers who only subscribe to the basic cable tier would be subject to proactive

regulation.[60] Equipment ordered by pay-per-view and per channel subscribers, like the services the equipment delivers, would be free of regulation. This scheme is consistent with the statute.

Public policy also informs against CFA and NATOA's interpretation. The disincentives to cost based regulation for the basic tier apply equally to equipment regulation. Cable operators would have little incentive to invest risk capital in the research and development of more efficient, higher quality equipment technology if all equipment were subject to cost based regulation. Given the advent of new services and offerings made possible by digital compression terminals, for example, this could be especially devastating for consumers. It is precisely this type of research and investment that would be stifled in CFA and NATOA's scenario.

## IV. THE RATE REGULATION PROCESS

### A. The Commission's Authority to Regulate Basic Service Tier Rates is Limited by the Act

As TCI set out in its comments, the plain language of the Act suggests a regulatory framework in which the

---

60 Further, cost-based regulation should not prohibit or discourage cable operators from offering discounted equipment or installation as part of a marketing scheme. Indeed, CFA and NATOA both recognize that such promotional tools are contemplated by the Act. See CFA at 133; NATOA at 50.

Commission's authority to regulate basic service rates would be strictly limited to those instances in which a local franchising authority had attempted to assert jurisdiction but its certification was either revoked or denied.[61] As a general rule of statutory construction advises: if "the language of a statute is clear and unambiguous" it may be concluded that the construction intended by Congress is obvious from the language used.[62] Thus, the Commission should not look further than the statutory language to ascertain the extent of the Commission's authority over the rates of the basic service tier. The plain language sets out no such authority. Act, § 623(a)(1); 623(a)(2)(A); 623(a)(6). Nonetheless, in their comments CFA looks beyond the plain meaning of the statute in an attempt to demonstrate a legislative intent for the Commission to regulate basic service tier rates in the event the franchising authority does not regulate such rates. CFA at 122-130. While acknowledging that a "literal reading" of the Act would render TCI's and the Notice's interpretation of the Act correct, CFA points to legislative history to suggest a contrary intent. Id. Even assuming a resort to the legislative history is appropriate here, CFA's arguments are misguided.

---

61 TCI at 42; Act, § 623(a)(1); 623(a)(2)(A); 623(a)(6).

62 3 Norman J. Singer, Sutherland Statutory Construction, at 7, § 57.03 (5th ed. 1992).

First, CFA claims that the conference agreement involved "major compromise amendments" to the House's version of Section 623, and that the amended provision, together with the rest of the Act, evinces an intent to "assure that all basic rates are regulated where there is no effective competition." CFA at 124-125. While CFA may be correct in asserting that Section 623 includes "major compromise amendments," CFA fails to note that Section 623(a)(6) ("Exercise of Jurisdiction by Commission") was not amended by the Conference Report. In other words, there was no compromise with respect to the exercise of jurisdiction of the Commission, the provision at issue here. Indeed, the notion that major compromises were made in this Section, yet none was made with respect to the Commission's jurisdiction, supports TCI's reading of the Act. Had the conference committee intended to change this language, it would have done so in connection with the other changes that it was making to this Section.

Next, CFA cites language from the Senate Report for the proposition that the Senate's intent regarding the Commission's authority to regulate basic service tier rates was "clear." Id. at 125, n.118; 127. However, the Senate approach (which included a wholly different regulatory scheme) was not adopted by the Conference Committee. Thus, the Senate legislative history has no relevance to this issue.

CFA also refers to the legislative history of the House bill. Id. at 125-127. Such legislative history too is

nonauthoritative. The statements of Rep. Dingell and Rep. Markey that CFA offers are alleged to support CFA's interpretation of Section 623(b)(1) -- "The Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable." However, the relevant Section 623(b)(1) language was not in the House bill at the time that the Dingell and Markey statements were made.

NATOA claims that the Commission may regulate basic service tier rates in the event that local authorities do not regulate such rates, because otherwise Section 623(b)(1) would be rendered superfluous. On the contrary, the Commission will indeed assure reasonable rates if it sets out simple benchmark rate regulations that local governments may easily enforce. The Commission's role under Section 623(b)(1) is one of supervision and standard setting; the implementation is left to the local jurisdictions. Nothing in this or any other section of the new law permits the FCC to force regulation on jurisdictions that have chosen, for whatever reason, not to undertake basic service tier regulation.

The Commission should be especially troubled by the suggestion of certain franchising authorities, which claim that franchising authorities that do not have the monetary or physical resources to regulate basic rates "could institute Commission regulation merely by filing for certification and having that certification disapproved." City of Austin et al. at 11-12; see also Municipal Franchise Authorities at 5. Such

attempts to transfer regulatory authority from local governments to the Commission clearly contravene the Act.

As noted above, the statute provides for the FCC to take over temporarily the regulatory operations of only those local franchising authorities that clearly intend to regulate basic tier rates themselves but for the temporary ineffectiveness of their certifications. In order to avoid transfers of authority from local governments that do not intend to regulate rates themselves, and therefore directly impede the Act's directives, the Commission should require that all certifications be filed in good faith. In addition, the Commission should announce clearly that its own residual regulatory authority will be effective and exercised only where the local franchising authority requesting certification actually has the requisite legal authority to regulate rates. The Act permits the Commission, during an interim period, "to exercise the franchising authority's regulatory jurisdiction," and no more. Act, § 623(a)(6). Thus, the franchising authority must hold such authority before the Commission properly may exercise it on a temporary basis. A certification that is not filed in good faith, or is filed by a local government that does not possess the requisite legal authority to regulate rates, should be rejected. If the local government does not cure the defect, then basic service tier rates remains unregulated in conformance with the plain language of the Act.

### B. The Local Franchising Authorities' Power to Regulate Basic Service Tier Rates is Dictated by State Law or Franchise Agreements

As TCI discussed in its initial comments, the Act cannot independently grant to local governments the right to regulate cable rates, order refunds, or set cable rates.[63] As creatures of the state, local governments do not receive such powers or authority from the federal government. Rather, as TCI pointed out, those powers must emanate from either state law or the franchise agreement. See I Ferris, Lloyd, Casey, CABLE TELEVISION LAW, § 13.14-15 (1992); TCI at 42-48.

NATOA claims that the Act grants to franchising authorities the power to regulate rates independent of a state law or franchise provision. NATOA at 30. Moreover, NATOA and other local governments, propose that they be permitted to enforce rate decisions by imposing remedies such as fines, rate refunds or by setting rates.[64] These commenters, however, fail to recognize that such powers must emanate from state law and

---

63 "The number, nature and duration of the powers conferred upon [municipal] corporations and the territory over which they shall be exercised rests in the absolute discretion of the state." Hunter v. Pittsburg, 207 U.S. 161, 178 (1907).

64 NATOA also suggests that it be permitted to deny a franchise renewal if a rate decision is not complied with. NATOA at 63-64. New York State Cable Commission contends that it be able to set rates and order refunds. NYS Cable Commission at 26. CFA also asserts that local franchising authorities should order refunds and set rates. CFA at 156.

the terms of a franchise agreement. The Act does not instill upon local governments powers that their creators have not, or that they once had but negotiated away as a matter of contract in the franchising process.

Prescinding from the constitutional question, neither the statutory language nor the legislative history set out an intent to grant the claimed rate regulatory jurisdiction to local governments. Indeed, as TCI set out in its comments, both the legislative history and the plain words of the Act render such an interpretation inappropriate. TCI at 46. The Act itself, in two provisions, questions the source of a local government's legal authority to regulate rates. Section 623(b)(3)(B) mandates that the local government inform the Commission as to its legal authority as part of the certification process. Act, § 623(b)(4)(B). Furthermore, Section 623(b)(4)(B) authorizes the Commission to deny or revoke a certification if legal authority does not exist. Act, § 623(b)(4)(B). These two provisions would be rendered superfluous if legal authority were instilled by the Act itself. While the 1992 Congress plainly desired to remove certain preemption effects created by the 1984 Cable Act, it did not attempt to create local power where none exists.[65]

---

65 Furthermore, the Commission recognized its inability to grant rate regulatory authority to local governments in 1976 when it deleted from its regulations a rule

(Footnote continued on page 60)

As TCI noted, power to regulate rates or exercise related authority, such as to order refunds, set rates or impose other fines, can only be granted through state law or the terms of a franchise agreement. TCI at 45-46. NATOA asserts, however, that the power to regulate rates can derive from home rule charters, police powers, or a local government's authority to regulate local economies or to regulate its streets, alleys or public ways. NATOA at 29-30. NATOA provides the Commission with legal authority it claims supports its position that local governments derive rate regulatory authority from these powers. Id. at 30-31. The cases NATOA presents, however, do not support the propositions for which they are offered.[66] While it is true that the state law that

---

65 (Footnote continued)

compelling local authorities to rate regulate. See Amendment of Rules Regarding the Regulation of Cable Television System Regular Subscriber Rates, 60 F.C.C. 2d 672 (1976). The Commission should not try to do here that which it has already recognized it cannot do.

66 NATOA cites Manor Vail Condominium Ass'n v. Town of Vail, 604 P.2d 1168 (Colo. 1980), for the proposition that municipalities have the right to regulate cable systems on the basis of "their wide latitude in the regulation of local economies." NATOA at 30. There, the issue of the source of the authority to regulate was not at issue. Rather, the subscriber/plaintiff questioned the constitutionality, under the equal protection clause, of a rate structure which charged lower cable rates to hotels, motels, lodges. 604 P.2d at 1171. The cite NATOA included in its comments regards the ability of local governments to allow rational distinctions between groups in the regulation of their local governments under

(Footnote continued on page 61)

grants the authority need not be explicit, the state law must exist. The Commission must be fully alert to the opportunities for local officials to misanalyze and misconstrue state law and/or the terms of the franchise agreement in certifying the existence of the requisite legal authority.

C. Procedural Framework for Rate Regulation

The Act specifically cautions the Commission to "seek to reduce the administrative burdens on subscribers, cable

---

66 (Footnote continued)

their police powers. Id.

NATOA offers City of Liberal v. Teleprompter Cable Service, 544 P.2d 330 (Kan. 1975) as support for its claim that the "municipality had authority to regulate rates pursuant to its police powers." NATOA at 30, n.12. The franchisee and franchisor in City of Liberal agreed as a term of the franchise agreement that the municipality would have the right to regulate cable rates. 544 P.2d 330, 333. The court there referred to the police powers as the basis for authority for the municipality to enter into the franchise agreement, not as the source of authority to regulate rates. Id. The authority to regulate rates was derived from the franchise agreement. Id.

NATOA relies on Illinois Broadcasting Co. v. City of Decatur, 238 N.E. 2d 261 (Ill. App. Ct. 1968) as support for its argument that state statutes that grant franchising authorities the right to control their streets and rights-of-way are a source of rate regulatory authority. Illinois Broadcasting Co. decides a wholly different issue. There, the issue on review was the source of authority to enfranchise. Id. at 264. The power to grant a franchise, the court said, derived from the authority to regulate the use of their streets, alleys and public ways. Id. The Illinois Broadcasting Co. court did not determine the source of power to regulate rates.

operators, franchise authorities, and the Commission" in designing procedures.[67] As TCI stated in its comments, in an effort to carry out its statutory mandate, the Commission should adopt procedures that are simple, do not cause undue cost or delay, and encourage the rapid implementation of new services and programming.[68]

Furthermore, the structure of any procedural framework that the Commission designs is limited by the scope of the Commission's jurisdictional authority to set forth procedures for local governments. The ability of the federal government to set out procedures for local authorities is limited by the range of its jurisdictional reach. In this regard, the FCC must not adopt tariff review procedures that parallel public utility regulation. TCI at 51-53. The record is replete with statements that the public interest is not served by imposing onto the cable industry the direct and indirect costs of

---

67 Act, § 623(b)(2)(A). In addition, the Act contemplates procedures that "minimize unnecessary regulation that would impose an undue economic burden on cable systems," and that would encourage cable systems to provide "the widest possible diversity of information sources and services to the public." Act, § 601(4), (6).

68 TCI at 48-51. The record strongly supports TCI belief that the FCC is the proper forum for appeals of rate decisions. See e.g., NATOA at 66; Continental at 47; Northwest Council at 9. The resolution of such disputes by the FCC will ensure the consistent application of the rules. In addition, the Commission is better equipped to decide the complex issue these disputes will undoubtedly involve.

cost-based regulation.[69] The FCC cannot disregard these concerns by adopting rate review procedures analagous to common carrier tariff review procedures. Indeed, Congress did not intent for Title II procedures to be imposed here: "It is not the Committee's intention to replicate Title II regulation." House Report at 83.

Accordingly, the FCC should not adopt the detailed regulatory procedures suggested by some commenters. The procedures suggested by NATOA and other franchising authorities do not comport with the statutory goals. Rather, the suggested procedures would impose undue burden and expense on cable operators and consumers by unnecessarily prolonging the rate review process, delaying the effectiveness of rate increases and slowing the deployment of new services and innovative programming.[70]

For instance, NATOA says franchising authorities should be given 30 days notice of an intent to raise rates so that they may "take initial steps" to start regulatory review.

---

69 See e.g., Besen et al. at 23-29; Cablevision at 12-14; Continental at 35-36; Cox at 8-11; NATOA at 44-46.

70 As TCI detailed in its comments, in an effort to remain consistent with the goal of establishing minimal procedures, the FCC should not promulgate detailed regulations beyond its statutory mandate. Thus, the usefulness of several of the proposed procedures are better decided by franchising authorities. FCC procedures need not incorporate such details. See e.g., NATOA at 77 (suggesting that notice of rate increase include a side-by-side comparison of the rate with the benchmark).

NATOA at 59. Thereafter, NATOA requests 120 days for an initial rate review plus an additional 90 days if franchise authorities require additional information to make their decision. Id. at 56. Under this proposal a rate review could take 240 days. A 240-day rate review schedule is clearly inappropriate. Congress afforded the FCC only 180 days to establish regulations to carry out the purposes of the Act. See Act, § 623(b)(1); 623(c)(1). Within 180 days the FCC is required to collect comments and data from hundreds of cable operators and other industry participants, review that data and comments, and promulgate comprehensive rate regulations. Yet the franchising authorities claim that they warrant 240 days to review the rates of one cable operator. The position is patently unreasonable.[71]

Under the statute, cable operators must give 30 days' advance notice of basic service tier increases. Act, § 623(b)(6). The Act does not provide for any other delay in any rate increase. As discussed earlier, if local franchising authorities have any such authority, it is derived from state law and the particulars of the franchise agreement.

---

71 NATOA also suggests that cable operators be required to publish proposed rate increases in subscriber bills and newspapers. NATOA at 59. Newspaper publication is unwarranted and costly. Subscriber notification via bill inserts is sufficient because all subscribers with authority to complain about rates will be given notice.

NATOA also recommends that the Commission delegate its authority to regulate cable programming service rates to local governments. NATOA at 72. The suggestion is inappropriate and should not be adopted by the FCC for several reasons. First, the plain language of the Act demonstrates that Congress did not intend for local governments to regulate programming. Two statutory provisions clearly and unequivocally set out the legislative intent. Section 623(a)(2)(B) states that "cable programming services shall be subject to regulation by the Commission." Act, § 623(a)(2)(B). Section 623(a)(1) limits the local governments' authority to regulate by saying that "[A]ny franchising authority may regulate the rates for the provision of cable services. . . but only to the extent provided under" Section 623. Act, § 623(a)(1). Nowhere in the Section are the local governments authorized to regulate cable programming services. Second, a scheme which authorized local governments to review rates initially would prolong the review process. Such a scheme contemplates two reviews of the appropriateness of the proposed rates. In addition, NATOA's proposal would increase overall administrative burdens. Time and resources from two governmental bodies (local and FCC) would be spent on each rate review. Third, the Commission has

no legal authority to delegate its statutory functions to non-employee third parties.[72]

## V. PROVISIONS APPLICABLE TO CABLE SERVICE GENERALLY

### A. Uniform Rate Structure

Several commenters miscontrued the uniform rate structure requirement of section 623(d).[73] These parties assert that the mandate for a uniform rate structure warrants identical rate levels throughout a specific geographic area. Id. As TCI's comments explain, the Act requires uniform rate structures, not rate levels. TCI at 60-61; see also Notice at ¶ 113. NATOA supports this construction. NATOA at 80.

The fundamental difference between rate structures and rate levels is a well-understood element of rate regulation.[74] A uniform rate structure requires that the categories or

---

72 See Communications Act of 1934, as amended, Section 5(c)(1), 47 U.S.C. § 155(c)(1) (FCC may delegate to panel comprised of individual commissioners or employees). See also 5 U.S.C. § 556(b) (governing presiding employees of hearings).

73 See e.g., Liberty at 2-13; NYS Cable Commission at 10, 17.

74 See e.g., I Kahn, "The Economics of Regulation: Principles and Institutions" at 25 ("Regulating the Rate Level"), at 54 ("Regulating Rate Structures") (1970).

components of the total rates charged are uniform.[75] The various rates charged for each of the categories or components, however, need not be identical. The reason for mandating a uniform rate structure is to set out prices for each component of the rate in a manner that facilitates comparisons of rate levels among cable subscribers. By mandating a uniform rate structure, regulators can readily discern unlawful discrimination.

### B. The Term "Geographic Area" Should be Construed as the "Franchise Area"

The Commission should reject the Notice's tentative conclusion that the term "geographic area" means the contiguous area served by a single cable system, even if the area incorporates multiple franchise areas. See Notice at ¶ 114-15. Most commenters support a contrary approach, where the term "geographic area" within the meaning of Section 623(d) equals "franchise area". The associations of local franchising authorities recognize that Section 623(d) "should not be

---

75 Below is an example of a uniform rate structure that comports with Section 623(d). As illustrated, a uniform rate structure does not require that the prices charged for each component are uniform.

| Customer Bill A | | Customer Bill B | |
|---|---|---|---|
| Basic Service | $10.00 | Basic Service | $10.00 |
| Taxes | $ .75 | Taxes | $ .50 |
| Franchise Fees | $ .50 | Franchise Fees | $ .30 |
| Volume Discounts | $ .50 | Volume Discounts | $ .00 |

interpreted to mean that the rate structure should be the same in each franchise area served by a cable system that serves multiple, contiguous franchise areas; the provision only requires that the rate structure within a franchise area be 'uniform'."[76] As TCI's comments set out, this construction is supported by the legislative history. See Senate Report at 76 (explaining Section 623(d) by reference to "franchise" area). It is also supported by reference to the basic fact that basic service rates will be regulated, for the most part, on a franchise basis and not community wide. Given the near consensus, the Commission should adjust its proposal accordingly.

### C. The Commission Must Not Interpret Retiering Efforts to Create a "Broadcast Basic" Tier as Evasions

As TCI pointed out in its comments, TCI has begun to reconfigure its cable service offerings in an effort to have them reflect the new regime. TCI at 64-65. Most importantly, TCI is offering the option of a "broadcast basic" service tier to substantially all of its subscribers. The launching of a slimmed down tier of services is consistent with both the letter and the spirit of the Act.

---

76 NATOA at 79-80. Among others, the Northwest Council and the Village of Schaumburg, Illinois also agree that the term "geographic area" should be construed as "franchise area." Northwest Council at 7; Comments of the Village of Schaumburg, Illinois at 4.

The Act expressly sets out minimum contents of the basic service tier. Act, § 623(b)(7). The decision of whether to add services to the basic tier beyond the statutory minimum requirements is solely within the cable operator's discretion. Id. As TCI stated, the statute also evinces a preference for a minimal basic tier, since voluntary channel additions by the operators are subject to pervasive regulation. Nonetheless, the State Attorneys General suggest that the Commission set out rules that require "cable operators in areas not subject to effective competition . . . to offer, as a basic tier subject to rate regulation, a set of services comparable to the basic tier offered by the operator on January 1, 1992."[77] They state that cable operators should "not be able to avoid rate regulation of a basic tier of services comparable to the basic tier offered at the time Congress considered, and passed, Section 623." Id. This suggestion miscategorizes TCI's efforts to create a "broadcast basic" tier of services. The reconfiguration is being conducted in specific response to the Act's goal of creating a reasonable cost basic service tier: "The purpose of Section 3 is to create a tier of low cost basic cable service."[78]

---

77 State Attorneys General at 11.

78 House Report at 83. In addition to making available a lower priced tier of service, retiering also aids to subject cable programming services to the substantially

(Footnote continued on page 70)

NATOA fails to recognize that the Act's preference for a "broadcast basic" tier necessarily will require retiering. This flows not only from Congress' express preference quoted above, but also from the anti-buy-through policy of the Act. In precluding cable operators from bundling the basic service tier with cable programming service tiers as a condition to subscribers obtaining pay programming, Congress acted to promote greater unbundling and consumer choice. Given this policy preference, it is especially odd that the cities would attempt to foreclose revenue-neutral retiering.

NATOA mislabels such reconfiguration efforts as "evasions." NATOA at 82-84. This characterization misinterprets the intent of the statutory prohibition against evasions as if it were some general prohibition against retiering and programming changes. The Conference Report specifically acknowledged that the statutory "provision is not intended to apply to changes in the mix of programming services that are included in various tiers of cable service." Conference Report at 65. Rather, the intent of the evasions section is to control the use of artifices whereby unlawful rate increases could be effectuated through manipulation of the

---

78 (Footnote continued)

less invasive "regulation by exception" scheme established by the new law, in recognition that these services generally do not warrant direct regulatory intrusion.

number of channels carried. Where revenue neutral changes occur, they are, by definition, not "evasions."

The Commission should make it clear that operators that comply with the Act's preference for a "broadcast basic" tier will be shielded from attempts, such as by the State Attorneys General, to force cable networks onto particular tiers.[79] In articulating this policy, the Commission should make it plain that it is preempting any franchise agreements which once called for "fat" basic tiers. The Act's preference for a trimmed down basic tier is plain. Equally plain is the Act's intent to permit additions to the basic tier's minimum requirements solely at the discretion of the cable operator. Any franchise agreement to the contrary must necessarily be "preempted and superceded" pursuant to Section 636(c).[80]

## VI. COMMERCIAL LEASED ACCESS

As TCI described in detail in its initial comments, the amendments made to Section 612 by the 1992 Cable Act are at

---

79 See also, Comments of Village of Schaumburg, Illinois at 3.

80 Act, § 636(c), 47 U.S.C. § 556(c).